No. 78287-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR., and LISA BLUME,

Plaintiffs/Petitioners,

vs.

GULF UNDERWRITERS INSURANCE COMPANY, and AMERICAN BUSINESS & PERSONAL INSURANCE, INC.,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Bryan P. Harnetiaux
WSBA No. 5169
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890

George M. Ahrend
WSBA #25160
P.O. Box 2149
Moses Lake, WA 98837
(509) 764-8426

On Behalf of
Washington State Association for Justice Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.[1]

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of insureds, including an interest in the law governing when a liability insurer is required to provide a defense in a civil action brought against its insured.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves a liability insurer's duty to defend a civil action brought against its insured. More particularly, at issue here is the proper interpretation and application of this Court's recent decision in Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 164 P.3d 454 (2007). The underlying facts are drawn from the unpublished Court of Appeals opinion and the briefing of the parties. See Planet Earth Foundation v. Gulf Underwriters Ins. Co., *noted at* 130 Wn.App. 1040 (2005), 2005

[1] WSAJ Foundation has applied to the Washington Secretary of State to register this name change, and the application is pending at this time.

Wash. App. LEXIS 3093, *review granted*, 163 Wn.2d 1058 (2008); Planet Earth Br. at 2-11; Gulf Br. at 1-18; Planet Earth Pet. for Rev. at 2-8; Gulf Ans. to Pet. for Rev. at 1-9; Planet Earth Supp. Br. at 1-3; Gulf Supp. Br. at 1.

For purposes of this amicus curiae brief, the following facts are relevant: Planet Earth Foundation (Planet Earth) is a nonprofit foundation assisting clients with advertising and public relations. Planet Earth is insured by Gulf Underwriters Insurance Company (Gulf), under a nonprofit management and organization liability insurance policy. This policy contains an endorsement that provides:

> In consideration of the payment of premium, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any of the Insureds for, based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error or omission by any Insured with respect to the rendering of, or failure to render professional services for any party.

Gulf Br. at 7 (quoting CP 617). Both the parties and the Court of Appeals refer to this provision as a "professional services exclusion." See Gulf, 2005 Wash. App. LEXIS 3093, at *1, *8; Planet Earth Supp. Br. at 1; Gulf Supp. Br. at 10. The policy does not define "professional services." See Planet Earth Br. at 9.

During the policy period, New York University (NYU) engaged Planet Earth to produce advertisements and public service announcements for a university program. NYU later sued Planet Earth and certain of its

representatives for breach of contract, fraud, trademark infringement, and unfair competition. Planet Earth tendered the claim to Gulf.

Gulf denied coverage and refused to defend the claim. It did not defend under a reservation of rights, nor initiate a declaratory judgment action to determine whether it was required to defend Planet Earth under the policy. The basis for Gulf's denial of coverage and defense, in whole or in part, was its determination that the professional services exclusion applied.

Thereafter, Planet Earth brought this suit against Gulf for breach of its duty to defend, and for a breach of its duty of good faith under the policy. The superior court denied Planet Earth's motion for partial summary judgment regarding the duty to defend, and certified the order for appeal.

In an opinion issued before this Court's opinion in Woo, the Court of Appeals determined that NYU's claims against Plaint Earth were subject to the professional services exclusion. The court rejected Planet Earth's argument that the undefined phrase "professional services" should be interpreted in light of the restrictive definition of "professional service" in RCW 18.100.030(1), a statute governing professional service corporations. See Planet Earth, 2005 Wash. App. LEXIS 3093, at *3-*6.

Relying on a Nebraska case, the Court of Appeals adopted a more expansive definition of "professional services," that included any work "involving specialized knowledge, labor, or skill and the labor or skill

involved is predominantly mental or intellectual, rather than physical or manual." Id. at *6-*7 (quoting Marx v. Hartford Accident & Indem. Co., 183 Neb. 12, 14, 157 N.W.2d 870 (1968)).[2] The Court of Appeals' adoption of this definition is traceable to the insurer's legal argument, which proposed the definition found in Marx. See Gulf Br. at 21-22.

Planet Earth filed a petition for review with this Court, which deferred consideration of the petition pending disposition in Woo. See Order (Oct. 11, 2006). After Woo was decided, the Court considered the petition and granted review. See Order (July 10, 2008).

Planet Earth's petition for review raises two questions: First, whether the underlying claims against Planet Earth based on alleged fraud, trademark infringement and other misconduct are subject to the duty to defend because they are unrelated or incidental to the services Planet Earth provided, see Planet Earth Pet. for Rev. at 1, 13; and, second, whether Gulf owed a duty to defend because the professional services exclusion is reasonably susceptible to multiple interpretations, see id. at 1, 16-17. This amicus curiae brief only addresses the second question.

III. ISSUE PRESENTED

> Under Woo, when may an insurer deny a duty to defend based upon its legal analysis of a policy provision, where the policy does not include a definition of a key term or phrase used in the provision?

---

[2] The Court of Appeals rejected an additional argument by Planet Earth that the allegations in the NYU complaint regarding fraud, trademark infringement and unfair competition involved conduct incidental to any services rendered by Planet Earth, and were thus covered events under the policy. See Planet Earth, 2005 Wash.App. LEXIS 3093, at *8-*9.

IV. SUMMARY OF ARGUMENT

Under this Court's decision in Woo v. Fireman's Fund Ins. Co., when the duty to defend hinges upon resolution of a legal issue bearing on coverage, the liability insurer must give the insured the benefit of any reasonable doubt on how the legal issue may be resolved by a court. In keeping with the "complaint allegation rule," if resolution of the legal issue could *conceivably* result in coverage, the insurer is obligated to defend its insured. (Of course, in most instances, the insurer has the option to defend under a reservation of rights and initiate a declaratory judgment action to resolve the disputed coverage question.)

Under this formulation, when the duty to defend turns on the meaning of a term or phrase not defined in the policy, if there is a reasonable definition that favors coverage, then the insurer must defend its insured. Absent a controlling legal authority defining the term or phrase, a dictionary is an appropriate source for determining whether, under the governing rules of construction, the term or phrase in question is subject to a definition that arguably provides *potential* coverage.

V. ARGUMENT

A.) General Overview Of Washington Law On Duty To Defend And The "Complaint Allegation Rule," Both Before And After *Woo*.

Under most liability policies an insurer has a duty to defend as well as a duty to indemnify its insured. The duty to defend is distinct from, and broader than, the duty to indemnify. Truck Ins. Exch. v. Vanport Homes,

Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002). The duty to defend protects the insured against *potential* liability, whereas the duty to indemnify protects the insured against *actual* liability. Hayden v. Mutual of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). The duty to defend is "one of the main benefits of the insurance contract" for the insured. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992).

The duty to defend arises when an action is first brought against the insured. Truck Ins., 147 Wn.2d at 760. It is based on the allegations of the complaint. An insurer has a duty to defend when a complaint against the insured alleges facts that could, if proven, impose liability upon the insured within the policy's coverage. Id.

In evaluating the duty to defend, the complaint is liberally construed in favor of imposing the duty. See Truck Ins. at 760. The duty is triggered if the insurance policy "conceivably" covers the complaint, so construed. Hayden, 141 Wn.2d at 64. Under this complaint allegation rule, the insurer must give its insured the benefit of the doubt that it has a duty to defend. See Truck Ins. at 761. The insurer is not relieved of its duty to defend unless the allegations of the complaint are "clearly not covered by the policy." Id. at 760.

If an insurer is uncertain of its duty to defend, it is not without options. Instead of simply refusing to defend, in most instances, the

insurer may elect to defend under a reservation of rights and seek a declaratory judgment that it has no such duty. Id. at 761.[3]

Before Woo v. Fireman's Fund Ins. Co., the duty-to-defend analysis tended to focus on the factual underpinnings for an insurer's obligation. See Truck Ins. at 60 (recognizing duty to defend arises when the complaint alleges facts which could, if proven, impose liability within the policy's coverage). Woo presented the question whether the complaint allegation rule also applied to *legal questions* bearing on coverage and the duty to defend. See 161 Wn.2d at 59-60. The insurer had argued "that if a legal issue is 'fairly debatable' at the time an insured requests defense, the insurer may refuse." Id. at 60 (citations omitted). This Court recognized that the insurer was "essentially arguing that an insurer may rely on its own interpretation of case law to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured." Id. The Court rejected this argument, clarifying that:

> the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, [the insurer] did the opposite — it relied on an equivocal interpretation of case law to give *itself* the benefit of the doubt rather than its insured.

Id.

[3] A declaratory judgment is not available as an option when the coverage issue is dependent upon fact-finding in the underlying litigation. See Holland Amer. Ins. v. National Indem., 75 Wn.2d 909, 911-15, 454 P.2d 420 (1969).

B.) Under *Woo*, An Insurer Must Defend Its Insured If The Legal Meaning Of A Key Undefined Term Or Phrase In The Policy Is Subject To A Reasonable Interpretation Favorable To The Insured That Could Conceivably Result In Coverage.

An insurer cannot unilaterally decide unsettled legal issues in its own favor in order to avoid the duty to defend. In Woo, the insurer obtained a "formal legal opinion" from counsel that it did not have a duty to defend under existing case law. 161 Wn.2d at 60. The legal opinion was "equivocal," in that the cases on which the opinion relied were "not entirely on point." Id. It did not matter to this Court that the legal opinion was "fairly debatable." Id. In the absence of clearly controlling legal authority, the Court held that the insurer's reliance on its own (favorable) interpretation of the law "flatly contradicts one of the most basic tenets of the duty to defend," that the insurer is supposed to protect the insured from potential liability. Id. Under Woo, the insurer is required to give the insured the benefit of the doubt when interpreting unsettled legal issues. If a reasonable interpretation could conceivably result in coverage, then the duty to defend is triggered.

Like Woo, this case involves a legal issue regarding the duty to defend. Yet, without the benefit of this Court's teaching in Woo, the Court of Appeals does not appear to have appreciated the uniqueness of the legal inquiry regarding coverage issues bearing on the duty to defend. There is no mention of "conceivable" coverage, "benefit of the doubt," or "potential liability." The court did not consider whether there was a range of reasonable definitions of "professional services" at the time the insurer

chose not to defend. Instead, it adopted a single definition traceable to the insurer's argument. The court rejected Planet Earth's definition of "professional services," drawn from RCW 18.100.030(1), on grounds that the statute "does not define professional services for insurance policy purposes." See Planet Earth, 2005 Wash. App. LEXIS 3093 at *5. It did not consider whether the statute reflected a reasonable definition of professional services, regardless of whether it technically applied outside of Ch. 18.100 RCW, or whether there were other reasonable definitions that conceivably could lead to coverage.

Ultimately, the Court of Appeals quoted and adopted Gulf's proposed definition of "professional services," drawn from the Nebraska Supreme Court's decision in Marx. See text supra at 3-4. The court's reliance on Marx further suggests it saw no distinction between resolving legal issues in a duty to defend context, as opposed to an indemnification context. See Planet Earth, 2005 Wash. App. LEXIS 3093, at *5 -*7. It adopted a definition of "professional services" that defined the phrase for *both* indemnification and duty to defend purposes. See Marx, 157 N.W.2d at 872 (holding no duty to indemnify or defend, and stating "[t]he obligation of an insurer to defend is no broader than the insuring agreement"). Apparently, under Nebraska law, at least as applied in Marx, a court is not required to ask whether, for duty to defend purposes, there is a definition of "professional services" favorable to the insured that could give rise to the *potential* for coverage.

As clarified in Woo, Washington law is to the contrary. A court must ask whether "professional services" is reasonably subject to a definition that could conceivably result in coverage. If so, the insurer must give its insured the benefit of the doubt and provide a defense. Absent a controlling definition, such as a Washington case providing a definition of general application, the inquiry may simply involve a review of the definition(s) of the key word or phrase in a standard dictionary. See generally Tyrrell v. Farmers Ins. Co., 140 Wn.2d 129, 133, 994 P.2d 838 (2000) (recognizing dictionary as resource for determining meaning to average purchaser of insurance of undefined term in an insurance policy); State Farm v. Ham & Rye, 142 Wn.App. 6, 12-13, 174 P.3d 1175 (2007) (same).[4]

In a duty to defend context, a dictionary will likely reveal whether, from the average purchaser of insurance standpoint, there is a reasonable

---

[4] The parties have not called to the Court's attention any controlling Washington legal authorities that provided a definition of "professional services" at the time Gulf determined not to defend. One Washington case, cited by Gulf, see Gulf Br. at 16, Harris v. Fireman's Fund Ins. Co., 42 Wn.2d 655, 257 P.2d 221 (1953), involved application of the phrase "professional services" in a malpractice exclusion in a public liability policy. Harris was a licensed osteopathic physician, and was sued by a patient who was injured when a treatment table collapsed. The insurer refused to provide a defense, claiming the malpractice exclusion applied, and Harris commenced a declaratory judgment action. Harris argued he was not negligent in his ministrations to the patient, and that any negligence regarding maintenance of the table fell outside the malpractice exclusion, thereby entitling him to a defense. See id., 42 Wn.2d at 657, 659.

This Court concluded the exclusion applied, finding the policy language unambiguous and that Harris was "in the performance of his professional services as an osteopathic physician." Id. at 660. Although the Court's analysis is wide-ranging, it ultimately finds:

> Since this policy was issued with respect to the office of an osteopathic physician, it is clear that the term professional services refers to the ministrations of such a physician as defined in RCW 18.57.010 *et seq.* [*cf.* Rem. Rev. Stat., §10056 *et seq.*]

Id. at 665. The result in Harris is consistent with the "clearly not covered" notion in the complaint allegation rule.

definition of the subject term or phrase that could conceivably form the basis for potential coverage for the insured. Under the lens established in Woo, the question regarding the duty to defend is not what the ultimate legal definition of the key policy term or phrase should be, but whether under the governing rules of construction a reasonable definition existed at the time the insurer decided not to defend that, if adopted, could result in coverage. If so, the benefit of the doubt must be given to the insured, and a defense must be provided.[5]

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in determining whether Gulf owed Planet Earth a defense under the policy, and resolve this appeal accordingly.

DATED this 27th day of January, 2009.

Bryan P. Harnetiaux *
BRYAN P. HARNETIAUX

George M. Ahrend *
GEORGE M. AHREND by Bryan P. Harnetiaux per authority

On behalf of WSAJ Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.

[5] As the coverage limitation here is in the nature of an exclusion, for purposes of determining the duty to defend under Woo, the burden of establishing that no definition of "professional services" could conceivably result in coverage would seem to be on the insurer. Cf. Ham & Rye, 142 Wn.App. at 12-13 (imposing burden on insurer to show exclusion applies).